

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ARABELA JINHONG,

Plaintiff,

v.

JO ANNE B. BARNHART, Commissioner
Social Security Administration,

Defendant.

Case No. C04-2502-JLR-JPD

REPORT AND RECOMMENDATION

Plaintiff Arabela Jinhong proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (the “Commissioner”). The Commissioner denied plaintiff’s application for disability insurance benefits (“DIB”) under Title II of the Social Security Act after a hearing before an administrative law judge (“ALJ”). For the reasons set forth below, the Court reverses the ALJ’s decision and remands for further administrative proceedings.

FACTS AND PROCEDURAL HISTORY

Plaintiff is a 58-year old woman with a general equivalency diploma (“GED”) and a history of work experience. AR 39. Plaintiff also attended cosmetology school, worked as a cosmetologist, and ultimately became the owner of her own salon, which she operated until

01 1996. AR 57-58, 205, 210. She also has work experience as a cosmetology instructor and a
02 file clerk. AR 57.

03 Plaintiff filed an application for DIB on January 26, 2002,¹ in which she alleged
04 disability beginning on March 26, 1996. AR 158-68. Plaintiff alleged disability stemming from
05 a right foot fracture, breast cancer, swelling and pain in her arm, and arthritis in her knees. AR
06 158-67. Her applications were denied initially and upon reconsideration. AR 108-11, 113-15.

07 An ALJ held a hearing to review plaintiff's application and on September 11, 2004
08 issued a decision. AR 16-29. Among other things, the ALJ found Ms. Jinhong capable of
09 performing sedentary work and therefore concluded that she was not disabled for purposes of
10 the Social Security Act. AR 28. The Appeals Council denied plaintiff's request for review,
11 making the September 11, 2004, decision of the ALJ the Commissioner's final decision for
12 purposes of judicial review.

13 Plaintiff timely filed this civil action to challenge the ALJ's September 11, 2004
14 decision. Dkt. No. 1.

15 JURISDICTION

16 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. §§
17 405(g) and 1383(c)(3).

18 STANDARD OF REVIEW

19 The court may set aside the Commissioner's denial of social security benefits when the
20 ALJ's findings are based on legal error or not supported by substantial evidence in the record
21 as a whole. *See* 42 U.S.C. 405(g); *Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993); *Smolen*
22 *v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996). Substantial evidence is defined as more than a
23 mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind
24 might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750

25
26 ¹The ALJ's decision indicates that the application was protectively filed on January 14,
2002. AR 19.

01 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in
02 medical testimony, and for resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039
03 (9th Cir. 1995). Where the evidence is susceptible to more than one rational interpretation, it
04 is the Commissioner's conclusion that must be upheld. *Thomas v. Barnhart*, 278 F.3d 947,
05 954 (9th Cir. 2002).

06 If the ALJ has committed error, the Court has discretion to remand for further
07 proceedings or to award benefits. *See Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990).
08 The Court may direct an award of benefits where "the record has been fully developed and
09 further administrative proceedings would serve no useful purpose." *McCartey v. Massanari*,
10 298 F.3d 1072, 1076 (9th Cir. 2002).

11 Such a circumstance arises when: (1) the ALJ has failed to provide legally
12 sufficient reasons for rejecting the claimant's evidence; (2) there are no
13 outstanding issues that must be resolved before a determination of disability can
14 be made; and (3) it is clear from the record that the ALJ would be required to
15 find the claimant disabled if he considered the claimant's evidence.

14 *Id.* at 1076-77.

15 EVALUATING DISABILITY

16 The claimant bears the burden of proving that she is disabled within the meaning of the
17 Social Security Act. *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). Disability is
18 defined as the "inability to engage in any substantial gainful activity by reason of any medically
19 determinable physical or mental impairment, which can be expected to result in death, or which
20 has lasted or can be expected to last for a continuous period of not less than twelve months[.]"
21 42 U.S.C. § 423 (d)(1)(A). A claimant is disabled only if her impairments are of such severity
22 that she is not only unable to do her previous work, but cannot, considering her age, education,
23 and work experience, engage in any other substantial gainful activity existing in the national
24 economy. *See* 42 U.S.C. §§ 423(d)(2)(A), 1382(c)(a)(3)(B); *See also Tacket v. Apfel*, 180
25 F.3d 1094, 1098-99 (9th Cir. 1999). The Social Security regulations set out a five-step
26 sequential evaluation process for determining whether a claimant is disabled within the meaning

01 of the Social Security Act. *See* 20 C.F.R. §§ 404.1520, 416.920. At step 1, the claimant must
02 establish that she is not engaging in any substantial gainful activity. 20 C.F.R. §§ 404.1520(b),
03 416.920(b). If the claimant establishes that she has not engaged in any substantial gainful
04 activity, the Commissioner proceeds to step 2. At step 2, the claimant must establish that she
05 has one or more medically severe impairments or combination of impairments that limit her
06 physical or mental ability to do basic work activities. If the claimant does not have such
07 impairments, then she is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant
08 does have a severe impairment, the Commissioner moves to step 3 to determine whether the
09 impairment meets or equals any of the listed impairments described in the regulations. 20
10 C.F.R. §§ 404.1520(d), 416.920(d). A claimant who meets or equals one of the listings for the
11 required twelve-month duration requirement is disabled. *Id.*

12 When the claimant's impairment neither meets nor equals one of the impairments listed
13 in the regulations, the Commissioner must proceed to step 4 and evaluate the claimant's
14 residual functional capacity ("RFC"). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the
15 Commissioner evaluates the physical and mental demands of the claimant's past relevant work
16 to determine whether the claimant can still perform that work. *Id.* If the claimant is not able to
17 perform her past relevant work, the burden shifts to the Commissioner at step 5 to show that
18 the claimant can perform some other work that exists in significant numbers in the national
19 economy, taking into consideration the claimant's RFC, age, education, and work experience.
20 20 C.F.R. §§ 404.1520(f), 416.920(f); *Tackett*, 180 F.3d at 1100. If the Commissioner finds
21 the claimant is unable to perform other work, then the claimant is found disabled and benefits
22 may be awarded.

23 DECISION BELOW

24 On September 11, 2004, the ALJ issued a decision denying plaintiff's request for
25 benefits finding:

26 . . .

- 01 2. The claimant met the disability insured status requirement of the Act on
02 March 26, 1996, the alleged disability onset date, and she had sufficient
quarters of coverage to remain insured only through September 30, 1996.
- 03 3. The claimant has not engaged in substantial gainful activity since the
04 alleged onset date.
- 05 4. During the time relevant to this matter, the claimant was status-post right
06 foot fracture, which was her only severe impairment. The impairment did
not meet or equal the criteria of any of the impairments listed in 20 C.F.R.
Subpart P, Appendix No. 1.
- 07 5. The claimant's statements concerning her impairments and their impact on
08 her ability to work are not entirely credible in light of information contained
in the medical reports and other evidence of record.
- 09 6. At the time she was last insured, the clamant retained the residual
10 functional capacity to perform sedentary work. The claimant could
stand/walk 2 hours in an 8-hour workday and sit for 6 hours in a workday.
11 She could not perform forceful pushing/pulling with her lower right
extremity. She could occasionally climb stairs, balance, stoop, kneel, and
12 crouch; she could not crawl or climb ladders. She needed to avoid
exposure to heights, hazards, temperature extremes, and uneven surfaces.
- 13 7. The claimant's impairments and limitations preclude her from returning to
14 any of her past relevant work.
- 15 . . .
- 16 9. The claimant could perform a full range of sedentary work during the
17 relevant time period, 20 C.F.R. § 404.1569 and rules 201.21 or 201.22 of
Appendix 2, Subpart P, Regulations No. 4, would direct a conclusion that
the claimant is not disabled.
- 18 10. Although the claimant was unable to perform a full range of sedentary
19 work at the time she was last insured, she was capable of other work that
exists in substantial numbers, such as small products assembler I, with
20 2,600 jobs in the local region, 6,000 jobs in the state, and 450,000 jobs
nationally. She also had job skills transferable to the occupation of general
21 ledger bookkeeper. Thus, she was not disabled within a framework of the
above-cited rules.
- 22 11. The claimant was not under a disability, as defined in the Social Security
23 Act, at any time through the date that she was last insured.

24 AR 27-28.

25 ISSUES ON APPEAL

26 The parties both agree that this case should be remanded due to errors by the ALJ. The

01 plaintiff requests remand for an immediate award of benefits. Dkt. Nos. 14, 19. The
 02 Commissioner concedes that the ALJ erred but requests a remand for further administrative
 03 proceedings. Dkt. No. 18. Additionally, the parties disagree as to (1) whether the ALJ erred
 04 at step 2 of his analysis by finding plaintiff's obesity and depression to be non-severe; and (2)
 05 whether the ALJ erroneously rejected lay-witness testimony from plaintiff's friends.

06 DISCUSSION

07 A. The ALJ Erred at Step 2 of His Analysis by Finding Plaintiff's Obesity and 08 Depression to be Non-severe.

09 Plaintiff argues that the ALJ erred by finding her obesity and depression to be non-
 10 severe impairments. Dkt. No. 14. She argues that his findings regarding her obesity were
 11 contradictory and that he failed to adequately evaluate evidence regarding her depression.²
 12 Defendant argues that the ALJ "properly accounted" for plaintiff's obesity, regardless of
 13 whether he found it to be severe. Dkt. No. 18.

14 Step 2 of the sequential evaluation process requires ALJs to determine whether the
 15 claimant has a severe impairment or combination of impairments that significantly limits their
 16 ability to perform basic work activities. 20 C.F.R. § § 404.1520(c), 416.920(c). When
 17 impairments consist of no more than a slight abnormality that has only a minimal effect on an
 18 individual's ability to work, a finding of non-severe is appropriate. *Smolen*, 80 F.3d at 1290
 19 (internal citations omitted). Hence, step 2 acts as a "*de minimis* screening device to dispose of
 20 groundless claims." *Id.*

21 Like other physical impairments, obesity can constitute a severe impairment, either
 22 alone or in combination with other medically determinable impairments, when it "significantly
 23 limits an individual's physical or mental ability to do basic work activities." SSR 02-01p.
 24 Because obesity can cause various functional limitations, an ALJ must assess precisely how a

25
 26 ²Plaintiff relies upon Social Security Ruling 00-3p to support her argument, but that
 SSR has been superceded by SSR 02-01p.

01 claimant's weight affects their ability to function in the work environment and explain how the
02 obesity limits the claimant's ability to perform work. *Id.*

03 Here, the ALJ observed that medical evidence throughout the file demonstrated that
04 plaintiff was obese. AR 24. He concluded that "her obesity may have some effect on her other
05 impairments[.]" AR 24. Ultimately, however, he concluded that she was able to function
06 "despite her weight[.]" *Id.* In reaching this decision, the ALJ apparently rejected several
07 opinions from treating physicians Criddle and Anderson that indicated plaintiff's obesity and
08 other impairments severely limited her ability to move and rendered her disabled. AR 24-25;
09 656, 666.

10 On remand, the ALJ should reevaluate plaintiff's obesity. The ALJ's assessment of
11 how plaintiff's obesity affected her ability to perform basic work activities is simply not clear.
12 He made no precise findings regarding how plaintiff's weight affected her ability to perform
13 basic work functions. The fact that the parties agree that the ALJ erred in his evaluation of the
14 testimony of Dr. Criddle and Dr. Anderson, which relate in part to plaintiff's obesity, further
15 suggests that plaintiff's obesity was a severe impairment.

16 Similarly, the ALJ should reevaluate plaintiff's depression. His conclusion with respect
17 to her depression was simply that "[o]verall, the evidence does not support a conclusion that
18 [plaintiff's depression was] a severe mental impairment on and before her date last insured."
19 AR 24. The Commissioner agrees that the ALJ erred in evaluating plaintiff's mental
20 impairments. Dkt. No. 18. Thus, the ALJ should evaluate all of the evidence regarding
21 plaintiff's mental impairments.

22 B. The ALJ Should Review Lay-witness Testimony From Plaintiff's
23 Friends in Light of all of the Medical Evidence Before Rejecting it.

24 Plaintiff argues that the ALJ failed to properly evaluate the written statements of
25 several of her friends. Dkt. No. 14. She argues that the ALJ provided no reasons for rejecting
26 these lay witness statements. *Id.* The Commissioner argues that the ALJ considered the

01 testimony, but properly found it credible only to the extent it was consistent with the medical
02 evidence. Dkt. No. 18.

03 In order to determine whether a claimant has an impairment, an ALJ may consider lay
04 witness sources, such as testimony from friends. 20 C.F.R. § § 404.1513(d)(4), 416.913(d)(4).
05 Lay witness testimony as to a claimant's symptoms or how an impairment affects ability to
06 work is competent evidence. *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987). It
07 therefore cannot be disregarded without comment. *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th
08 Cir. 1993). If an ALJ wishes to discount the testimony of a lay witness, he must provide
09 reasons germane to each witness. *Id.* Identifying inconsistencies between such statements and
10 the record when looked at as a whole is sufficient. *Lewis v. Apfel*, 236 F.3d 503, 511-12 (9th
11 Cir. 2001).

12 Here, the ALJ was presented with written statements from plaintiff's friends that tended
13 to show the degree of limitations plaintiff experienced on a day-to-day basis. AR 25-26, 237-
14 240. For instance, Carol Carr indicated that the most she saw plaintiff stand since her
15 impairment occurred was a half hour. AR 237. Margaret Heinen and Sharon Swanson offered
16 similar testimony and indicated that plaintiff appeared to be in constant pain. AR 238-40. Ms.
17 Swanson and Ms. Heinen also opined that plaintiff could not work. AR 238.

18 The ALJ stated that these reports were credible, but only to the extent they were
19 consistent with the medical reports that indicated plaintiff was capable of sedentary work. AR
20 26. The ALJ's decision provides no basis to determine what was accepted and what was
21 rejected. The conclusory statements in his decision, thus, provide no effective basis for judicial
22 review. The ALJ did not identify any specific inconsistencies between the witness statements
23 and the medical records. On remand, the ALJ will review the lay witness testimony in light of
24 the applicable medical records and specifically identify those parts of the testimony he accepts
25 and those parts that he rejects.

26 C. The Case Should be Remanded for Additional Administrative Proceedings.

01 The Court may direct an award of benefits where “the record has been fully developed
02 and further administrative proceedings would serve no useful purpose.” *McCartey*, 298 F.3d
03 at 1076. The Court may credit evidence and remand for an award of benefits when:

04 (1) the ALJ has failed to provide legally sufficient reasons for rejecting the
05 claimant’s evidence; (2) there are no outstanding issues that must be resolved
06 before a determination of disability can be made; and (3) it is clear from the
record that the ALJ would be required to find the claimant disabled if he
considered the claimant’s evidence.

07 *Id.* at 1076-77. Here, plaintiff has not demonstrated that an immediate award of benefits is the
08 appropriate remedy. Rather, for the reasons discussed below, the Court shall remand this case
09 for further administrative proceedings.

10 1. The ALJ Failed to Provide Legally Sufficient Reasons
11 For Rejecting Plaintiff’s Evidence.

12 The first criteria necessary for the Court to credit evidence and remand for an
13 immediate award of benefits is that the ALJ must have “failed to provide legally sufficient
14 reasons for rejecting the claimant’s evidence[.]” *McCartey*, 298 F.3d at 1076-77. This
15 element is satisfied. Indeed, the Commissioner concedes in her memorandum requesting
16 remand that the ALJ erred in several respects. Dkt. No. 18. Hence, the first criteria is
17 satisfied.

18 2. Outstanding Issues Must Still Be Resolved Before a
Disability Determination Can be Made.

19 Having found that the ALJ failed to provide legally sufficient reasons for rejecting
20 plaintiff’s evidence, the Court must assess whether there are any “outstanding issues that must
21 be resolved before a determination of disability can be made[.]” *McCartey*, 298 F.3d at 1076-
22 77. Here, there are a variety of issues that must still be resolved before a disability
23 determination can be made.

24 For instance, the parties agree that the ALJ erred at step 2 by finding plaintiff’s mental
25 impairments non-severe. Upon reconsideration, even if the ALJ finds plaintiff’s depression to
26 be a severe impairment, it is not clear precisely what effect it will have on plaintiff’s ability to

01 perform other work. Additionally, it does not appear that the ALJ employed the “special
02 technique” to evaluate mental impairments that is required by the regulations. *See* 20 C.F.R. §
03 § 404.1520a, 416.920a. Hence, questions remain about the extent of plaintiff’s mental
04 impairments, as well as their functional and vocational impacts.

05 The ALJ’s flawed RFC analysis also leaves unresolved questions about the extent of
06 plaintiff’s ability to work. The parties agree that the ALJ erroneously evaluated the testimony
07 of treating doctors. These opinions provide somewhat inconsistent information as to plaintiff’s
08 capabilities. For instance, Dr Fallon opined that plaintiff could perform some sedentary work
09 and noted that she would be ready for employment within about a year of her alleged onset
10 date. AR 349-50. Yet, he also appears to have expressed doubt at her ability to perform at
11 least half time and identified varying degrees of impairments over the course of his treatment of
12 her. *See, e.g.* AR 349-57. This testimony therefore raises questions about the extent of
13 plaintiff’s impairments and how long the impairments lasted. These are ambiguities that are
14 best resolved at the administrative level upon remand.

15 Ambiguities also surround the ALJ’s step 5 analysis, particularly regarding what
16 sedentary jobs plaintiff could actually perform and whether conditions at those jobs would
17 adequately accommodate her impairments. The ALJ erroneously concluded that plaintiff could
18 perform the job of small parts assembler, but, as plaintiff points out, that job is categorized as
19 “light” whereas the ALJ determined plaintiff was only capable of sedentary work. The ALJ’s
20 failure to explain this discrepancy raises questions about plaintiff’s ability to perform that
21 position, as well as other sedentary jobs that the VE might have identified. *See Johnson v.*
22 *Shalala*, 60 F.3d 1428, 1434-35 (9th Cir. 1995) (indicating that an ALJ may rely on testimony
23 from a VE that conflicts with the Dictionary of Occupational Titles when he provides
24 “persuasive” evidence for doing so); SSR 00-4p. Moreover, although the VE testified that
25 employers would accommodate plaintiff’s need to elevate her knee, he supplied no quantitative
26 data on the availability of jobs that might permit such accommodations. AR 103.

01 Finally, the ALJ concluded that plaintiff had some transferable job skills and was
02 capable of working as a general ledger bookkeeper. AR 27. Although the VE noted that
03 plaintiff had some skills that would “probably” be transferable and that some of them “at least
04 sound[ed] like [skills that could transfer to] bookkeeping clerk[.]” AR 62. Nevertheless, the
05 broad conclusions reached by the ALJ do not appear to be justified by the VE’s testimony. *See*
06 *Pinto v. Massanari*, 249 F.3d 840, 847 (9th Cir. 2001) (noting that the ALJ’s reliance on VE
07 testimony without findings left the record deficient for review). Additionally, the ALJ failed to
08 identify the number of general ledger bookkeeper jobs that exist in the national economy.

09 Finally, there is ambiguity regarding the ALJ’s application of the Medical Vocational
10 Guidelines. According to the Guidelines, individuals approaching advanced age³ who “can no
11 longer perform vocationally relevant past work and have no transferable skills” will ordinarily
12 be found disabled. 20 C.F.R. Pt. 404, Subpt. P., App. 2, § 201.00(g). When a claimant is
13 within a few months of reaching this category and doing so would result in a disability
14 determination, ALJs must not “mechanically apply” the category, but must instead consider all
15 of the evidence to determine whether to apply the older age category. 20 C.F.R.
16 §§ 404.1563(b), 416.963(b).

17 Here, the ALJ determined that applying the older-age job category was not appropriate
18 because plaintiff’s fiftieth birthday was approximately six months after her date last insured.
19 AR 27. Hence, the ALJ was not obliged to apply the older-age category. He noted that
20 plaintiff had “some transferable job skills[.]” which could direct a finding of non-disability.
21 However, if this is the basis for his decision not to apply the older-age category, his findings
22 should be more specific. On remand, the ALJ is directed to address the older-age category
23 issue, and to set forth in greater detail the reasons for adopting the older-age category, or
24 failing to do so.

25
26 ³Individuals aged 50 to 54 are considered “approaching advanced age.” 20 C.F.R.
§§ 404.1563(d), 416.963(d).

01 3. It is Not Clear From the Record That the ALJ Would
 02 Have to Find Plaintiff Disabled If He Considered
 03 Plaintiff's Evidence.

04 Plaintiff argues that if all of her evidence is credited as true, she would have been found
 05 disabled. Dkt. Nos. 14, 19. The record, however, does not demonstrate that the ALJ would
 06 have had to have found plaintiff disabled if he credited plaintiff's evidence as true. As noted
 07 above, there are several ambiguities in Dr. Fallon's testimony. Other medical, vocational, and
 08 lay testimony adds further complexity to this disability determination. For instance, Dr. Criddle
 09 opined that he believed plaintiff was disabled since March, 1996. AR 676-78. However Dr.
 10 Gierei⁴ opined that plaintiff would be able to perform sedentary work, an opinion he believed
 11 was consistent with Dr. Fallon's records. AR 575-82. Drs. Bernadez-Fu, Flemming, and
 12 Quint also opined that she was capable of performing functions consistent with sedentary
 13 work. AR 457-63. Dr. Nielsen, the medical expert who testified at the hearing, even testified
 14 that plaintiff was capable of light work. AR 100. Hence, even if plaintiff's preferred testimony
 15 is credited as true, it is not clear that a finding of disability would be required.

16 Moreover, the Court is not required to credit plaintiff's testimony as true. To the
 17 contrary, the Court retains the discretion to credit testimony as true and may remand for
 18 further administrative proceedings. *Connett v. Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003);
 19 *see also Dodrill*, 12 F.3d 919 (remanding with instructions for the ALJ to "articulat[e] specific
 20 findings for rejecting [the claimant's] pain testimony and the testimony of lay witnesses.")
 21 When the Court determines that the ALJ must evaluate certain testimony (or provide adequate
 22 reasons for rejecting it), as it has here, remand for further administrative proceedings is
 23 appropriate.

24 D. Reopening of Plaintiff's Prior Application


26 ⁴This spelling is an approximation. The copy in the record is not clear.

01 In her reply brief, plaintiff argues that, because the ALJ reopened a prior application
02 when making his decision, the Court should order payment of benefits based on that earlier
03 application. Dkt. No. 19. Alternatively, she argues that if the Court determines to remand, the
04 Court should order the Commissioner to consider the earlier application re-opened on remand.
05 *Id.* The Commissioner agreed at oral argument that plaintiff's January 1999 application should
06 be deemed reopened upon remand and that it should be used to determine any payment of
07 benefits.

08 CONCLUSION

09 For the reasons described above, this case should be remanded for further
10 administrative proceedings, together with the January 1999 application, which is directed to be
11 reopened. Upon remand the ALJ shall correct the deficiencies identified above, with emphasis
12 on the following: (1) re-examine plaintiff's obesity and depression at step 2; (2) reevaluate the
13 medical opinions of Dr. Fallon and Dr. Criddle; (3) reevaluate the adverse credibility
14 determination; and (4) call medical and vocational experts well qualified to evaluate plaintiff's
15 mental and orthopedic impairments. A proposed Order accompanies this Report and
16 Recommendation.

17 DATED this 27th day of August, 2005.

18 
19 JAMES P. DONOHUE
20 United States Magistrate Judge
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